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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1875

H & M CAKE BOX, INC.,
PETITIONER,

v.

BAKERY AND CONFECTIONERY WORKERS INTERNATIONAL UNION OF AMERICA, LOCAL UNION NO. 45,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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No.

H & M CAKE BOX, INC.,
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BAKERY AND CONFECTIONERY WORKERS INTERNATIONAL UNION OF AMERICA, LOCAL UNION NO. 45,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The petitioner, H & M Cake Box, Inc., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit, entered in this proceeding on March 20, 1974.

Opinions Below

The opinion of the Court of Appeals, as yet unreported, appears at Appendix A, *infra*, pp. 9-11).

The opinion of the District Court allowing defendant's motion for summary judgment was not reported. It is set forth in Appendix B, *infra,* pp. 12-20).

The first opinion of the Court of Appeals is reported at 454 F.2d 716. It is set forth in Appendix C, *infra,* pp. 21-24).

Jurisdiction

The judgment of the Court of Appeals was entered on March 20, 1974 (*infra,* Appendix A, pp. 9-11). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

The facts most favorable to the company were that the union struck in breach of the no-strike provision of their collective bargaining, and the union also refused to arbitrate. The company brought suit under Title 29 U.S.C. § 185 for damages. The District Court granted the union's motion for summary judgment. The Court of Appeals (in the first appeal) reversed and remanded the case to the District Court (*infra,* Appendix C, pp. 21-24). The union filed a second motion for summary judgment with the District Court. This second motion was also granted. The Court of Appeals affirmed the judgment of the District Court granting the union's second motion for summary judgment.

1. Whether or not a Court of Appeals may apply subsequent judicial decisions to a prior factual situation without violating the due process clause of the Fifth and Fourteenth Amendments to the Constitution of the United States?

2. Whether or not the Court of Appeals was correct in determining that the factual issues in dispute should have

been determined by an arbitrator and not by a court?

3. Whether or not the Court of Appeals erred in its interpretation of *International Union of Operating Engineers, Local 150, AFL-CIO* v. *Flair Builders, Inc.*, 406 U.S. 487 (1972), and its application to this case?

4. Whether or not a breach of a no-strike clause of a collective bargaining agreement coupled with a refusal to arbitrate the dispute relieves the company from its duty to arbitrate?

5. Whether or not a company is compelled to arbitrate strike damages where the union fails and refuses to seek arbitration of those issues?

Constitutional and Statutory Provisions Involved

Constitution of the United States, Amendment V:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law . . ."

Constitution of the United States, Amendment XIV, § 1:

> ". . . nor shall any state deprive any person of life, liberty, or property, without due process of law . . ."

Title 29 U.S.C. § 185 (Section 301 of the Labor Management Relations Act of 1947):

> "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organization, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

Statement of the Case

This action originated by the filing of a complaint in the District Court on behalf of a bakery to obtain money damages from a local union for breach of their collective bargaining agreement. This bakery was part of an employer association, and it was the employer association who formed the collective bargaining agreement with the local union. On June 25, 1969, the union agent violated certain provisions of the collective bargaining agreement and told the bakery to take it or else. When the bakery refused, the union agent called a strike. The bakery requested arbitration at that time, but the union agent refused. The union agent controlled the union. As a result of the strike, the owners of the bakery were forced to work some sixteen hours a day seven days a week to maintain their business. But even so, production fell off substantially.

The union filed a motion for summary judgment in the District Court, alleging that the bakery repudiated the contract and not the union. The District Court granted the motion. The bakery appealed to the Court of Appeals Appendix C, pp. 21-24, *infra*), which reversed and remanded the case to the District Court for trial. The District Court relying on intervening decisions of this Court and the Court of Appeals granted the union's second motion for summary judgment. The Court of Appeals (Appendix A, pp. 9-11, *infra*) affirmed the judgment of the District Court.

Reasons for Granting the Writ

1. The first decision of the Court of Appeals interpreted the collective bargaining agreement as not including within its scope money damages for breach of the no strike pro-

visions. The second decision of the Court of Appeals is in direct conflict with the first. The second decision of the Court of Appeals declared that a company could not pursue a damage claim in the District Court prior to a determination by an arbitrator that the claim is not arbitrable. The issue as to whether a strike is such a repudiation of a collective bargaining agreement as to excuse an employer from its duty to arbitrate is a question to be determined in each case. See *Teamsters, Chauffeurs, Warehousemen & Helpers* v. *Lucas Flour Co.*, 369 U.S. 95 (1962); *Atkinson* v. *Sinclair Refining Co.*, 370 U.S. 238 (1962); *Drake Bakeries, Inc.* v. *Bakery Workers, Local 50*, 370 U.S. 254 (1962); and *Packing House Workers, Local 721* v. *Needham Packing Co.*, 376 U.S. 247 (1964). It cannot be said as a matter of law that there are no factual issues for the District Court to determine. The function of the District Court on a motion for summary judgment is not to determine facts but rather to determine whether any genuine issues of material facts exist. See *United States* v. *Diebold*, 369 U.S. 654 (1962).

2. The District Court determined that the bakery and not the union refused to arbitrate. The bakery alleged in its complaint that the union struck in violation of the no strike provisions of their collective bargaining agreement, and then the union refused to arbitrate. There are certain allegations that the union agent dominates the union as well as the employer association that negotiated the collective bargaining agreement in question here. The union has never initially requested arbitration of the strike damages in this case. Rule 56 of the Federal Rules of Civil Procedure authorizes summary judgment only when the moving party is entitled to judgment as a matter of law. See *Sarter* v. *Arkansas National Gas Corp.*, 321 U.S. 620 (1944). There are material issues of fact to be resolved by the court.

3. The second decision of the Court of Appeals (*infra*, Appendix A, pp. 9-11) incorrectly applied your recent decision of *Operating Engineers, Local 150* v. *Flair Builders, Inc.*, 406 U.S. 487 (1972) to this case. Your decision specifically stated that "nothing we say here diminishes the responsibility of a court to determine whether a union and employer have agreed to arbitration. That issue as well as the scope of the arbitration clause remains a matter for judicial determination." *id.* at p. 491. This Court did not overrule its prior decisions in this area; it merely re-emphasized them. However, the Court of Appeals in the First Circuit has taken the position that in light of *Flairs Builders,* supra "the issue of repudiation is for the arbitrator, not us." *General Dynamics Corp.* v. *Local 5, Marine & Shipbuilding Workers,* 469 F.2d 848, 853 (1st Cir. 1972). Their interpretation is clearly incorrect. The issue of repudiation may or may not be arbitrable depending upon the arbitration clause of the collective bargaining in question. The holdings of the Court of Appeals appears to be that if there is an arbitration clause, they will defer to arbitration no matter what the factual issue may be.

4. This Court has recently recognized that there is a difference between a judicial proceeding an an arbitration proceeding. This is especially so where the arbitration process may be tainted by the dominating force of one man who can control both the union and the company association to which this bakery belongs. An arbitrator is not governed by the rules of evidence. Further, a judicial proceeding provides for jury determinations if appropriate. An arbitration proceeding has no provision for jury determination. An arbitrator has a vested interest in determining that a dispute is arbitrable, and he has a vested interest in maintaining his position as arbitrator

for future disputes. If the union agent dominates the union and the employer association, it is easy to see the influence this may have on that arbitrator. No such problem exists where it is a jury and court determining the factual issues. They have no vested interest in the outcome other than trying to arrive at the truth. It was not the union that requested arbitration of the damage claim. It was the bakery and then the employer association.

5. The second decision of the Court of Appeals (*infra*, Appendix A, pp. 9-11), deprives the bakery of any remedy. The first decision of the Court of Appeals (*infra*, Appendix C, pp. 21-24) states that on the facts of the case, the issues of fact were for the Court to decide. The second decision (*infra*, Appendix A, pp. 9-11) states that the issues are not for the Court to decide, but rather for the arbitrator. Thus, it leaves the bakery with no remedy, even though it may be that the union struck in breach of a collective bargaining agreement, refused to arbitrate, and dominates the employer association of which the bakery was a member. Hardly, a decision designed to promote industrial peace. The fluctuating decisions of the Court of Appeals has deprived the bakery of property without due process of law. It has the effect of applying subsequent cases to prior factual situations. In other words what was appropriate action for the bakery in 1970 based on a 1969 strike becomes inappropriate because of judicial decisions in 1972. Although not within the letter of the ban against making ex post facto laws, it is well within the spirit of that ban to apply present judicial decisions to past fact situations which were lawfully done. It is against the principles of the Constitution of the United States, and it is against fundamental principles of fair play.

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Boston, Massachusetts
Counsel for Petitioner

APPENDIX A

United States Court of Appeals
For the First Circuit

No. 74-1004

H & M CAKE BOX, INC.,
PLAINTIFF, APPELLANT,

v.

BAKERY AND CONFECTIONERY WORKERS INTERNATIONAL UNION OF AMERICA, LOCAL NO. 45,
DEFENDANT, APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Before
ALDRICH, McENTEE and CAMPBELL,
Circuit Judges.

Frederick T. Golder for appellant.
Warren H. Pyle, with whom *Angoff, Goldman, Manning, Pyle & Manning* was on brief, for appellee.

March 20, 1974

PER CURIAM. After we remanded this case to the district court, 454 F.2d 716 (1st Cir. 1972), another judge, relying on intervening decisions of the Supreme Court and this circuit, granted summary judgment for the defendant union. The district court held that both the employer's claim for damages for alleged violation of the no strike clause and its contention that the union had repudiated the collective bargaining agreement, or its arbitration

provision, were issues for the arbitrator to decide. The court therefore dismissed the action brought by the company for damages for the union's alleged violation of the agreement's no strike pledge. We affirm.

The collective bargaining agreement in question calls broadly for "amicable settlement by arbitration of grievances and disputes arising under it." Arbitration procedures are provided "[i]n the event a dispute or grievance arises as to the meaning, application or enforcement of this agreement . . . ." Employer's claim for damages would rather plainly fall within this "broad" clause. Similarly, and under the very rationale we adopted in *General Dynamics Corp.* v. *Local 5, Marine & Shipbuilding Workers,* 469 F.2d 848, 853-54 (1st Cir. 1972), the question of what conduct constitutes repudiation of the contract or its arbitration provision would be a "dispute or grievance . . . as to the meaning, application or enforcement . . . ." *Cf. Operating Engineers, Local 150* v. *Flair Builders, Inc.,* 406 U.S. 487, 491-92 (1972).

Thus, following *Flair* and *General Dynamics,* both decided after our earlier decision herein, the district court properly concluded that the employer could not pursue its damages action in court at least before a determination by the arbitrator of non-arbitrability or of repudiation. If plaintiff wishes to pursue the argument that breach of the no strike clause excuses compliance with the arbitration clause, he must address it to the arbitrator. *Cf. Gateway Coal Co.* v. *United Mine Workers,* 414 U.S. —, 42 U.S.L.W. 4095, 4100 (Jan. 8, 1974).

Appellant fears that should he now seek arbitration, the union will raise the defense of laches. It is doubtless true that appellant could not have predicted the legal fluctuations which resulted in our two disparate opinions and which may have prolonged these proceedings and tipped the outcome to appellant's disadvantage. Presumably such

circumstances tending to justify his initial preference for court proceedings in lieu of arbitration may be presented to the arbitrator in mitigation should laches be raised.

Affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION No. 70-539-F
H & M CAKE BOX, INC.
v.
BAKERY AND CONFECTIONERY WORKERS
INTERNATIONAL UNION OF AMERICA,
LOCAL No. 45

ORDER
November 7, 1973

FREEDMAN, D.J.

This action is brought under §301 of the Labor Management Relations Act, 29 U.S.C. §185 (1970). Plaintiff alleges that defendant breached its collective bargaining agreement by calling a strike on June 25, 1969, resulting in damage to the plaintiff. The case was previously before another district court judge who granted summary judgment for the defendant union. That disposition was reversed on appeal and the case is now before this Court on remand. Defendant has renewed its motion for summary judgment on the basis of recent decisions of the Supreme Court and this circuit. Plaintiff suggests that since these cases were decided subsequent to the commencement of the action and subsequent to the circuit court reversal in this case, the Court should not consider them. For reasons to be stated further on, this Court disagrees with that contention and proceeds with a ruling on the motion for summary judgment.

After due consideration of oral arguments heard on October 15, 1973 and study of the parties' briefs, it appears that the facts most favorable to the plaintiff are as follows:

On or about June 25, 1969, a dispute arose between one Myerow, plaintiff's treasurer, and one Newman, defendant's business agent, over the union's right to substitute one worker for another at the company's bakery. It is alleged that Newman threatened to order a strike if the company did not accede to his demands and that later the same day he did in fact order several employees to leave their jobs immediately. It is further alleged that Myerow suggested arbitration and that Newman scoffed at the suggestion. Union employees did not appear for the night shift and were thereafter on strike. The officers of the company were forced to carry on the operations of the business themselves.

The company's bargaining agent arranged for an arbitration proceeding to be held on June 30. The company refused to arbitrate, however, because of the strike and because the officers were all occupied running the bakery. On July 11, a company attorney wrote to the union stating that, as of May 29, the company was no longer a union shop and that if the company owed any money to the union it would satisfy that obligation upon notification of the amount owed.

The district court based its rulings allowing summary judgment for the defendant on the following findings: (1) that the company's refusal to arbitrate prevents it from complaining about the strike; (2) that the letter by the company's attorney acted as a repudiation of the contract; and (3) that the contract requires arbitration of violations of the no-strike clause. Article XIII of the collective bargaining agreement entered into by the parties provides that neither the union "nor any of its agents will engage in, incite, or participate in any strike, slowdown, work stoppage, withholding of production or other interference with production or work." Article XIV provides in part that:

> "It is hereby agreed that there shall be no strikes ... during the term of this agreement, since it provides for the amicable settlement by arbitration of grievances and disputes arising under it."

and further:

> "If either party fails to abide by the arbitration procedure as hereinafter provided, the other is relieved from his duty to refrain from a strike or lockout as the case may be."

And finally, paragraph (a) of Article XIV provides:

> "In the event a dispute or grievance arises as to the meaning, application or enforcement of this agreement, it shall be handled in the following manner:"

The agreement then sets forth the grievance procedure to be followed which includes the provisions for arbitration.

In reversing the lower court, the circuit court ruled that the contract does not "necessarily" require arbitration of breaches of the no-strike agreement and that "very possibly" the no-strike agreement is the *quid pro quo* for the arbitration clause. The court also found that there were issues of fact left in dispute as to whether certain alleged conduct on the part of Newman constituted union repudiation of the agreement, thus freeing the company from its obligations under the contract, and whether the letter of July 11 constituted a breach or repudiation of the contract as of May 29th on the part of the company. See *H & M Cake Box, Inc.* v. *Bakery and Confectionery Workers International Union of America, Local No. 45*, 454 F.2d 716, (1st Cir., 1972). These issues of fact still exist. In the light of recent decisions, however, these issues could be interpreted as involving disputes which should be resolved by an arbitrator and not by judicial decision.

Since the reversal by the Court of Appeals, two relevant decisions have been reported which, defendant urges,

favorably support a renewed motion for summary judgment. In *International Union of Operating Engineers, Local 150, AFL-CIO* v. *Flair Builders, Inc.*, 406 U.S. 487 (1972), the Supreme Court held that parties to a collective bargaining agreement which provides for arbitration of "any difference" between them, are required under such agreement to arbitrate a claim that particular grievances were barred by laches. However, the Court re-emphasized the previously stated principle that the responsibilities of determining whether a union and employer have agreed to arbitrate and what the scope of such an arbitration provision may be, are matters for judicial decision. Once such a determination has been made, a court should not consider issues which it finds were intended for arbitration.

The Court of Appeals for this circuit relied on *Flair* in *General Dynamics Corporation* v. *Local 5, Industrial Union of Marine and Shipbuilding Workers of America, AFL-CIO,* 469 F.2d 848 (1st Cir., 1972). Both parties in that case agreed that a claim for damages for an alleged breach of a no-strike clause was an arbitrable issue. Plaintiff asserted, however, that it was no longer obliged to arbitrate the issue because defendant's conduct amounted to a repudiation of the agreement's arbitration provision. The Court held that, in light of *Flair*, "The legal defense of repudiation which necessarily requires an interpretation of the meaning of the contract and the intent of the parties, can be subject to an arbitration provision, if covered by its terms."

In the case at bar, plaintiff argues that we should not consider these opinions which were decided after the action was commenced. I disagree. The two cases were both basically contract interpretation cases and there is no reason to conclude that they should be given only prospective consideration. This Court feels it may look to both *Flair* and *General Dynamics* for guidance, but the determi-

nation of how it will interpret the agreement in question still belongs to this Court. It appears that there is no question of the existence of this agreement between the Greater Boston Hebrew Master Bakers' Association Inc. (of which plaintiff was a member) and Bakers Union Local 45 of Boston, and both parties agree that the agreement was in effect on June 25, 1969. There is no suggestion by either side that the contract was not a final integration of the rights and duties of the parties as to those matters enumerated within it and there is no reason for the Court to believe it is necessary to hear extrinsic evidence on the intention of the parties concerning the interpretation of the agreement. This Court will, then, exercise its power to determine the existence and scope of the arbitration provision (Article XIV) of the agreement before it and, in so doing, it concludes that at this stage the matter belongs before the arbitrator and not the Court.

While it may not be as clear as in *General Dynamics,* that a claim for damages for the breach of the no-strike clause is an arbitrable grievance, it seems very clear that questions of interpretation of the agreement are for the arbitrator. Paragraph (a) of Article XIV calls for the implementation of the arbitration provisions in the event of a "dispute or grievance" as to the "meaning, application, or enforcement" of the agreement. The question of whether or not a particular issue is arbitrable is certainly a question of "meaning, application, or enforcement" of the agreement and thus arbitrable itself. The Court of Appeals, in *General Dynamics,* reached a similar conclusion when it stated at 469 F.2d 854:

> "It is indisputable that the question of what conduct, if a breach, constitutes repudiation of the arbitration provision is a 'question involving the interpretation or application of this Agreement' and thus an arbitrable grievance."

That reasoning applies equally well in the case at bar. Whether or not the plaintiff was excused from his duty to arbitrate because defendant's conduct amounted to a repudiation of the arbitration provision is a question of "meaning" and "application" and, as such, is for the arbitrator as provided in paragraph (a). The Court also notes that by the terms of Article XIV a party is relieved of his duty to refrain from a strike or lock-out if the other party refuses to follow the arbitration procedure. It is glaringly obvious that there is no such provision for the converse situation. That is, there is no provision relieving a party from its duty to arbitrate if the other party breaches the no-strike, no lock-out clause. The Court should not read such a provision into the agreement where it seems obvious the parties would have included it had it been their intention to do so.

Accordingly, defendant's motion for summary judgment is allowed. The Court will not order arbitration at this late date as it appears that the contract has not been in effect for some time and that the parties have ceased their relationship altogether. Although it is recognized that this decision may effect a harsh result on the plaintiff, the Court feels the integrity of collective bargaining agreements providing for the peaceful arbitration of differences between labor and management must be preserved.

Judgment for the defendant.

(s) Frank H. Freedman
District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 70-539-F

H & M CAKE BOX, INC.

v.

BAKERY AND CONFECTIONERY WORKERS INTERNATIONAL UNION OF AMERICA, LOCAL NO. 45

MEMORANDUM ON RECONSIDERATION OF ORDER OF NOVEMBER 7, 1973

December 14, 1973

FREEDMAN, D.J.

This Court issued an order on November 7, 1973 granting summary judgment for the defendant in this case. Upon reflection, the Court has concluded that the original order does need clarification and expansion. The outcome will remain the same, however.

In its original order the Court interpreted the contract to call for arbitration of whether or not defendant's conduct amounted to a repudiation of the contract thereby excusing plaintiff from arbitration. Before this determination can be made, however, the Court now feels there must be a finding that the contract called for arbitration of a claim for damages for breach of the no-strike provision.

If there was no duty to arbitrate such a claim, then there is no issue of repudiation. In both *Drake Bakeries, Inc.* v. *Local 50, American Bakery Workers,* 370 U.S. 254 (1962), and *General Dynamics* (as cited in order of Nov. 7 in this case), it was found there was a duty to arbitrate such a claim. The plaintiffs in those cases argued that, even if the contract allowed for arbitration, they were excused because the breach acted as a repudiation. *General Dynamics, supra,* held otherwise. The First Circuit there

stated that the question of repudiation was for the arbitrator. On page six of its original order, this Court suggested that "whether or not a particular issue is arbitrable is certainly a question of 'meaning, application, or enforcement' of the agreement and thus arbitrable itself." The Court did not mean to imply that the power to determine the existence and scope of an arbitration provision is, in the first instance, for the arbitrator. This is clearly a function for the Court. It is for the Court to determine whether or not this agreement calls for arbitration of breaches of the no-strike clause.

The prior district court judge in this case did make a finding that the agreement called for arbitration of violations of the no-strike clause in an order granting summary judgment. In reversing, the Court of Appeals said there were issues of material fact remaining and suggested that the no-strike clause is "very possibly" the *quid pro quo* for the arbitration clause. This Court fails to see why it cannot now make a finding of whether or not violations of the no-strike clause are arbitrable. There is no issue of fact over the existence of the contract or its being in effect on June 25, 1969. In a hearing held in chambers concerning plaintiff's motion for reconsideration, counsel for both parties admitted to the Court that the contract was the final and complete expression of the parties' agreement and that no further evidence could be introduced which would prove otherwise or which would be admissible to alter or clarify the terms. This Court does not believe the Court of Appeals intended to make a final determination that plaintiff was relieved from any duty to arbitrate. Since *General Dynamics,* it appears that the existence of those questions of material fact on which the Court of Appeals based its reversal, may well be questions for the arbitrator and not the Court.

After consideration of *Drake Bakeries, supra, Atkinson* v. *Sinclair Refining Co.*, 370 U.S. 238 (1962), *General Dynamics, supra, Packinghouse Workers* v. *Needham*, 376 U.S. 247 (1964), and a careful examination of the agreement, the Court finds that said agreement did indeed call for arbitration of violations of the no-strike clause. Under *General Dynamics*, the issue of repudiation is for the arbitrator.

The Court of Appeals, in reversing the prior district court judge, stated that the contract did "not necessarily require arbitration of breaches of the no-strike clause" and referred to a comparison between *Atkinson* and *Drake*. In *Atkinson*, however, the Supreme Court found that it was clear from the agreement that arbitration was called for only in the case of *employee* grievances. There is no such clarity here, and I think this case is more akin to *Drake Bakeries*. I also wish to re-emphasize what was pointed out in this Court's original order. The agreement here provides that a refusal to arbitrate relieves the other party from its duty to refrain from a strike or lockout. There is no provision excusing arbitration where there is a violation of the no-strike clause.

Consequently, the original order of November 7, 1973 granting summary judgment to the defendant, as amended by this memorandum, will not be disturbed.

Plaintiff's motion for reconsideration of the original order is denied.

(s) Frank H. Freedman
District Judge

APPENDIX C

United States Court of Appeals
For the First Circuit

No. 71-1322

H & M CAKE BOX, INC.,
PLAINTIFF, APPELLANT,

v.

BAKERY AND CONFECTIONERY WORKERS INTERNATIONAL UNION OF AMERICA, LOCAL NO. 45,
DEFENDANT, APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Before ALDRICH, *Chief Judge*,
MCENTEE, *Circuit Judge*, and
WYZANSKI, *Senior District Judge*.*

Frederick T. Golder for appellant.
Warren H. Pyle, with whom *Angoff, Goldman, Manning & Pyle* was on brief, for appellee.

January 28, 1972

MCENTEE, *Circuit Judge*. This is an appeal from the granting of summary judgment against the company, appellant herein, in an action brought by it under § 301 of the Labor Management Relations Act, 29 U.S.C. § 185 (1970). The company alleged that the appellee union had breached its collective bargaining agreement by calling a strike on June 25, 1969.

* Sitting by designation.

The facts most favorable to the company indicate that on or about June 25, 1969, a dispute arose during a telephone conversation between the company's treasurer, Martin Myerow, and the union business agent, George Newman, over the union's right to substitute one worker for another at the company's bakery. The business agent is alleged to have threatened a strike if the company did not accede to his demands. The argument continued when Newman appeared personally at the company's plant later the same day and ordered several employees to leave their jobs immediately. Myerow suggested arbitration, to which Newman is alleged to have replied, "Arbitrate [profanity], I'll fix you good." Union employees did not appear for the night shift and thereafter the union was on strike.

As a result of this strike it was necessary for the officers of the company to work sixteen hours per day, seven days a week, to retain their business. The company's bargaining agent[1] arranged for an arbitration proceeding to be held on June 30, the company, however, refused to participate because the union was on strike and because the officers of the company were too busy to leave the bakery. On July 11 an attorney for the company wrote to the union stating, "that as of May 29, 1969 the H & M Cake Box, Inc. . . . was no longer a union shop. If any money is owed to the union up until that time, please advise us of the amount and where it should be paid." The company appears to have been in arrears in its payments to the union's health and welfare fund.[2]

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[1] The company is a member of the Greater Boston Hebrew Master Bakers Association, Inc., which serves as the bargaining agent for its members.

[2] The "Jobbers Holiday Fund, the Bakers Union Local #45 of Boston & Subscribing Employers' Health & Welfare Trust Fund, and the Bakers' Union Local #45 of Boston & Subscribing Employers' Pension Trust Fund" are referred to herein as the health and welfare fund.

In granting summary judgment for the union the district court ruled that: (1) the company's refusal to arbitrate prevents it from complaining about the strike; (2) the letter by the company's attorney acted as a repudiation of the contract; and (3) the contract requires arbitration of violations of the no-strike clause.

Addressing ourselves initially to the district court's third point, we find that the contract does not necessarily require arbitration of breaches of the no-strike agreement. *Compare Atkinson* v. *Sinclair Refining Co.*, 370 U.S. 238 (1962), *with Drake Bakeries, Inc.* v. *Local 50, American Bakery Workers*, 370 U.S. 254 (1962). Article XIV of the contract states:

> "ARBITRATION — GRIEVANCES
>
> "It is hereby agreed that there shall be no strikes unless for those reasons as may be expressed herein or lockout during the term of this agreement, since it provides for the amicable settlement by arbitration of grievances and disputes arising under it."

Very possibly, unlike the contract in *Drake Bakeries*, here the no-strike agreement is the *quid pro quo* for the arbitration clause. Thus an unauthorized strike relieves the company of its obligation to arbitrate. Even if the no-strike agreement were not the *quid pro quo* of the duty to arbitrate, there remains the factual issue of the effect of Newman's actions on June 25. His refusal to arbitrate, coupled with his simultaneous strike call, may have constituted an independent union repudiation of the arbitration agreement, thus relieving the company from any further obligation under that clause of the contract.

Whether the letter of July 11 constituted a breach or repudiation of the contract as of May 29 is also a disputed material issue of fact which should be resolved at trial. The union contends that it did not breach either the arbitration clause or the no-strike clause because this

letter relieved it of the duty to refrain from striking. The contract provides that the union may strike if the company refuses or fails to make payments to the health and welfare fund.[3] While this letter may affect the company's ultimate ability to recover in this action, it cannot, however, by benefit of hindsight, provide justification for the union action on June 25.

In view of the above, it is evident that there were material issues of fact which the district court improperly resolved on the motion for summary judgment. Rule 56 Fed. R. Civ. P.; *United States* v. *Diebold,* 369 U.S. 654 (1962). The court's function here was not to determine the facts but rather to determine whether a genuine issue of material fact existed.

Reversed and remanded for proceedings not inconsistent with this opinion.

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[3] Payments were due fifteen days after billing, but it appears that strict compliance was not required by the union, and the present record is silent as to whether the company had in fact been billed. The affidavit of George Newman states that no payment had been made for the period beginning with the week ending June 13. Assuming a billing at the end of that week, the company could not be deemed to have been in violation of the contract until June 28, three days after the strike. The only indication we have of anything resembling a bill is a letter from the union to the company dated July 7, 1969.